



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 3070-99
27 March 2000



Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 9 March 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion provided by the Specialty Leader, Pulmonary and Critical Care Medicine, dated 6 February 2000, and your rebuttal thereto.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

With regard to the issue of your fitness for duty at the time of your release from active duty in 1966, the Board substantially concurred with the comments contained in the advisory opinion. It did not accept your unsubstantiated contention to the effect that you were "offered" a medical separation by your treating physician. The Board concluded that the statement from Dr. Cote which you submitted in support of your application did not have any probative value. It found that even if it were to be assumed, for the sake of argument, that your "pre-existing scarring of the lung has compounded to the emphysema to aggravate" your present disabling condition, as Dr. Cote maintains, the aggravation did not occur for many years after you were discharged from the Marine Corps. In addition, it noted that according to Dr. Cote, the primary cause of your chronic lung disease was your use of tobacco over many years.

The Board did not accept your contention to the effect that you were placed in a de facto

limited duty status from the date of your return to duty after recovery from your chest wound and the date of your release from active duty. In this regard, it noted that upon your completion of training at NATTC, Millington, Tennessee, on 21 December 1962, you were transferred to MCAS, El Toro, California, where you served as a supply clerk, and received duty ratings of 4.4, 3.9, 4.7 and 4.2 during the 19 January 1963-31 January 1965 period. You were confined at hard labor on 30 March 1965, and upon your release, reassigned as a barracks orderly and messman for brief periods, after which you served as a special services/athletic and recreation assistant until June 1966, when you were released from active duty. The Board concluded that it is likely that your reassignment was prompted by concerns over your suitability for service as supply clerk in an aviation squadron, given your two instances of nonjudicial punishment, conviction by court-martial, and confinement at hard labor, rather than due to your inability to perform supply clerk duties because of the residuals of your chest wound. The Board noted that when you underwent your pre-separation physical examination on 16 June 1966, you did not disclose any conditions which you felt were disabling or in need of further evaluation by a physician, despite signing a statement to the effect that you had been admonished to disclose any such conditions. The Board noted that on 11 June 1967, you advised officials at Headquarters, Marine Corps Reserve Data Center, that you were a college student, and working in a Saturn missile assembly plant, where your duties included riveting, drilling, and assembly of missiles. The Board presumed that the physical activity required of you in that job was much more strenuous than that required of a supply clerk. The Board also noted that you did not apply to the Veterans Administration for disability compensation for residuals of your wound until 1981. You were not awarded service connection for those residuals for another fifteen years, when the condition was rated at 0%.

The Board concluded that you have not demonstrated that your chest wound was incurred in the line of duty. In this regard, it substantially concurred with the findings and conclusions of the investigating officer. Although the evidence as to what actually occurred on 7 July 1962 is somewhat equivocal, the Board concluded that given the totality of the circumstances of your encounter with Mr. and Mrs. Spellman on that date, it was reasonably foreseeable that you would be injured during your encounter with them, and that your disregard of the reasonably foreseeable consequences of your actions amounted to gross negligence.

In view of the foregoing, your application has been denied. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official

records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Pulmonary Division
National Naval Medical Center
8901 Wisconsin Avenue
Bethesda MD 20889-5600
(301) 295-4217
Fax: (301) 295-2831

6 February 2000

From: Specialty Leader, Pulmonary & Critical Care Medicine
To : Chairman, Board for Correction of Naval Records

Subj: APPLICATION FOR CORRECTION OF NAVAL RECORDS IN THE CASE OF
FORMER [REDACTED]


Encl: (1) BCNR File
(2) Service Records
(3) Medical Records
(4) Copies of Medical Records From Counsel

1. The enclosed documents were reviewed as requested and are returned with this letter. Former [REDACTED] has indicated that he believes that his physical disability was related to a gunshot wound to the right chest in 1962, which required a chest tube and multiple drainage procedures. The result was a small area of scarring at the right lung base.

2. [REDACTED] VA records indicate that his primary disability is secondary to emphysema and not service connected. The conclusion of the reviewing officer, [REDACTED] MD (3/16/9) was that the impairment was due almost completely to his emphysema/COPD and that while it was possible that the gunshot wound caused some slight reduction in lung function, the effect would be so minimal that it would not be an issue in limiting his activities. The records support this position. His chest radiographs and CAT scan show minimal scarring and pulmonary function studies from the VA dated 03 June 1997 show severe hyperinflation and air trapping. This pattern is not consistent with scarring/restriction and is most likely secondary to his 50 pack-year smoking history.

3. My opinion is that [REDACTED] disability is not related to the gunshot wound and that his claim for revision of his Naval Record and disability should be denied. His limitation is due to emphysema, which is not documented to have occurred while on active duty.

4. If additional information is required, please feel free to contact me at the address and telephone number listed above.


[REDACTED]
CAPT(sel), MC, USN

FEB 17 1990